Intermountain Rural Electric Association *and* International Brotherhood of Electrical Workers Local 111, AFL–CIO. Cases 27–CA–10711, 27–CA–10711–3, and 27–CA–10890

May 25, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On November 29, 1991, the National Labor Relations Board issued a Decision and Order in this proceeding[1] in which it, inter alia, ordered that the Respondent restore callout and standby overtime selection procedures to those which existed at its Sedalia, Colorado facility prior to December 14, 1988, and to make whole employees for any losses they sustained as a result of the unlawful changes in those procedures. On February 3, 1993, the United States Court of Appeals for the Tenth Circuit enforced the Board's Order in an unpublished order and judgment.[2]

On January 14, 1994, the Regional Office issued an amended compliance specification and notice of hearing, alleging that the Respondent was obligated to make whole four employees who suffered losses as a result of its unilateral change in procedures for selecting employees for callout overtime work.[3] On August 23, 1994, Administrative Law Judge Michael D. Stevenson issued the attached supplemental decision, dismissing the amended backpay specification. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in answer to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

A. *Introduction*

In dismissing the General Counsel's amended backpay specification, the judge relied on essentially three grounds: (1) that attachments to the General Counsel's posthearing brief should be stricken from consideration as not having been properly introduced into the record; (2) that the portion of the unfair labor practice order in the underlying proceeding at issue here does not warrant the usual presumption that some backpay is owing; and (3) that the General Counsel's proposed formula for determining which employees were owed standby and callout overtime pay and the amounts thereof was not reasonably designed to approximate the amounts the employees lost by reason of the Respondent's unilateral change. We disagree with each of those conclusions, and, for the reasons set forth below, we award backpay in the amounts specified in the General Counsel's posthearing brief, which reflects a reduction in amounts originally sought because the General Counsel conceded the merit of an argument made by the Respondent at the backpay proceeding and recalculated the specification figures accordingly.

B. *The General Counsel's Formula and the Respondent's Counterarguments*

The single backpay issue in this proceeding is the extent of the loss suffered by certain unit employees when the Respondent changed its procedure for selecting employees for callout overtime (overtime necessitated by unforeseen emergency situations) and standby overtime (emergency work limited to weekends and holidays).[4] The Respondent changed from procedures in which overtime was made available to employees either by use of a list prepared by an employee overtime committee (callout overtime) or by advance employee selection, with seniority determining who could select first (standby overtime). The Respondent's unilateral change of both procedures to an alphabetical rotation procedure was found unlawful in the unfair labor practice proceeding, and the backpay period covers the period from December 14, 1988, when the change was implemented, until May 1992, when the Respondent restored the previous selection procedures.

The General Counsel recognized that he could achieve only a reasonable approximation of the losses because (1) the emergency nature of callout overtime meant that the amount available would necessarily vary from year to year and (2) the fact that accepting offers of overtime work was not mandatory in either the original procedures or the unilaterally implemented procedure meant that the amounts worked by individual employees were subject to all the vagaries that might influence employee decisions to perform extra work. The formula he chose attempted to control for these variables by averaging overtime figures from several years under the original system to compare with overtime worked during the backpay period under the changed procedures. His first step was to determine the number of hours of overtime worked by every

[1] 305 NLRB 783.

[2] 984 F.2d 1562.

[3] The Regional Office issued a compliance specification and notice of hearing on July 30, 1993. The Respondent complied with those parts of the specification dealing with insurance premiums and computation of premium pay, but not with the parts of the specification dealing with liability for the unilateral change in overtime selection procedures. Thus, the General Counsel issued an amended specification, limited to this issue.

[4] These categories of overtime exclude overtime that results from the continuation of work beyond the regular workday, specialty crew work, and scheduled overtime.

member of the bargaining unit[5] during each year of the 3-year period immediately prior to the Respondent's unilateral change in selection procedures (1986, 1987, and 1988), add up those figures to determine the total overtime hours worked by the unit each year, and then convert each unit member's total hours into a percentage of the unit's total overtime for each of the 3 years. These three resulting percentages were then averaged to arrive at a figure described as the employee's ''representative percentage.''

The second step was, using the same method, to compute each employee's quarterly percentage of total overtime worked during each quarter of the nearly 3-1/2-year backpay period, during which the Respondent operated under the unilaterally implemented system. Finally, each employee's quarterly overtime percentage during the backpay period was compared with his/her ''representative percentage.'' The difference was converted into hours and multiplied by the Respondent's overtime pay rate.

Applying this formula, the General Counsel alleged in his amended specification and at the hearing that four unit employees had suffered financial loss as a result of the application of the unilaterally implemented system.[6]

The Respondent attacked the validity of the General Counsel's formula with the expert testimony of a statistics professor, Dr. Darl Bien, who asserted that there was no statistically significant difference between the amount of individual employees' overtime during the representative period and the amounts worked during the backpay period. The Respondent also asserted that certain technological and equipment advances had improved its operations, thereby rendering emergency overtime repair work less available generally during the backpay period than it had been during the representative period. The Respondent contended that the General Counsel's reliance on total overtime figures rather than callout/standby figures alone additionally distorted the proffered specification. The Respondent also argued that the employees named in the specification were less likely to accept overtime during the backpay period than during the representative period because of various personal circumstances which rendered them less available for such assignments. The Respondent further attempted to discredit the General Counsel's backpay figures by introducing evidence establishing that two individuals (Kogan and Keefe), whose overtime records were included in the formula, were not members of the bargaining unit for the entire representative period, thereby skewing the universe of similarly situated employees and the General Counsel's results.

Before the close of the hearing, the judge granted the General Counsel's request that the record remain open in order to permit the General Counsel to submit expert evidence to rebut the Respondent. The General Counsel did not proffer any additional evidence however, and thereafter moved to have the record closed.

In his posthearing brief, the General Counsel took account of the Respondent's evidence concerning the similarly situated unit employees and, deleting the hours for employees Kogan and Keefe, recomputed the representative percentages and submitted these revised backpay figures to the judge.[7] These recalculations resulted in the total elimination of overtime backpay for employees Novacek and Fox, and the downward adjustment of Fedders' backpay by $2,466.38 to $2,123.04 and the reduction of Eveleth's backpay by $1,146.91 to $1,870.26.[8]

C. *The Judge's Decision*

As stated above, the judge rejected the General Counsel's position in its entirety. First, he struck the attachments to the General Counsel's posthearing brief, reasoning that they were tantamount to a second amended compliance specification and that because they had not previously been made a part of the record, they could not properly be considered. He also faulted the General Counsel for failing to identify who performed the calculations which gave rise to the revised backpay figures.

Second, the judge held that the usual presumption that some backpay is owing when unfair labor practices of the kind at issue here have been found ''does not apply in this case.'' He pointed to the Respondent's having previously paid a substantial sum of money in compliance with other parts of the Board's order in the underlying unfair labor practice case, and to his having ''discredited''[9] the General Counsel's

[5] In order to compare only those employees who may be described as ''similarly situated,'' the General Counsel limited his calculations to include only employees who had been employed within the unit throughout the 3-year representative period and through, at least, the first quarter of 1991 during the backpay period.

[6] The General Counsel stated that Mitchell Eveleth was owed $3,017.17; Gerald Fedders, $4,589.42; Gordon Novacek, $1,583.73; and James Fox, $1,035.52.

[7] The General Counsel submitted three documents:

Attachment A is the recalculation of the representative percentages, using figures submitted into the record by the Respondent; Attachment B is the recalculation of the quarterly overtime totals using the Respondent's figures; and Attachment C is the recalculation of the employees' quarterly and total backpay figures.

[8] We note that the judge misinterpreted the General Counsel's recomputations for Novacek and Fox and failed to designate a negative notation before the ''new figure'' amount for them. Thus, according to the General Counsel's revised calculations, neither Novacek nor Fox is due any backpay, with Novacek at —$301.51 and Fox at —$179.72.

[9] While the judge used the term ''discredited'' to describe his view of the General Counsel's witness, we find that he is not using this term in its usual sense, i.e., to mean that the witness is not testifying in a manner consistent with the truth. Rather, the judge appears to be signaling his rejection of the backpay formula which this wit-

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witness, a representative from the Regional Office who testified to the methodology used in drawing up the compliance specification. For those reasons, the judge concluded that the General Counsel had failed to establish a prima facie case that backpay was owed. Thus, the judge reasoned he need not even address the significance of the testimony of the Respondent's expert witness.

Finally, the judge listed three reasons for faulting the General Counsel's formula. First, citing the voluntary nature of the overtime system, the judge determined that employees were less likely to accept overtime assignments during the backpay period than during the representative period, thereby rendering unreliable the General Counsel's comparisons of percentage of overtime worked during those two time periods. Second, the judge reasoned that because less overtime work was available during the backpay period than had been available during the representative period, no reliable comparisons could be made. Third, the judge found that the General Counsel's use of total overtime figures rather than callout and standby overtime figures alone rendered the General Counsel's results invalid. Thus, the judge concluded that the General Counsel failed to demonstrate that any employee was financially harmed by reason of the Respondent's unilateral change in the callout and standby overtime selection procedures.

D. *Discussion*

Turning first to the judge's procedural rulings, we find that the General Counsel's posthearing brief and attachments do not constitute an amended specification or new evidence. The attachments are precisely as the General Counsel describes them, that is, simply recalculations of the backpay figures based on evidence which the Respondent entered into the hearing record concerning the composition of the bargaining unit. Specifically, the General Counsel simply eliminated from his calculations the overtime figures for Kogan and Keefe—the employees who, as the Respondent demonstrated at the hearing, did not work within the bargaining unit for the duration of the representative period—and recomputed the totals and percentages without those two employees' hours. This is not, therefore, new evidence, but only an arithmetic adjustment to the General Counsel's specification in light of record evidence proffered by the Respondent itself.[10] Because the General Counsel's attachments reflected merely recalculations to reflect his acceptance of the Respondent's own evidence and argument concerning the error of including Keefe and Kogan in the unit during the representative period, there was no need to reopen the record. The Respondent could not reasonably claim to be surprised or procedurally disadvantaged by the General Counsel's agreement with one of its arguments and the resulting elimination of all backpay for two claimants and reduction of backpay for the two others. Accordingly, we reverse the judge's sua sponte ruling to strike the attachments to the General Counsel's brief and find them appropriate for consideration.

We also disagree with the judge's conclusion that the presumption of backpay does not apply in this proceeding. The unlawful unilateral actions of the Respondent in modifying the overtime selection procedures created the potential loss of income to employees by virtue of depriving them of overtime opportunities. Any financial harm caused by the Respondent's unfair labor practices in this regard is distinct from the financial impact of the Respondent's other unfair labor practices. Thus, the fact that the Respondent may have provided backpay to employees who suffered losses as a result of the unlawful unilateral changes pertaining to premium pay eligibility and insurance premium obligations does not relieve the Respondent of liability for the financial consequences of its change in the callout and standby overtime selection procedures. Contrary to the judge, therefore, we find that the presumption that some backpay is due to remedy the effects of the Respondent's unlawful action is properly applied in this case.

We also find that the presumption was not defeated by the testimony of the Respondent's expert witness, Dr. Bien, concerning his statistical analysis of the overtime records. The ultimate opinion reached by Dr. Bien was simply that the differences between the representative period and the backpay period in amounts of overtime worked by the employees allegedly affected by the change in selection procedures were not sufficiently significant to persuade him that the differences were the result of that change rather than merely random variation. That testimony does not amount to an affirmative conclusion that the differences were not caused by the selection procedure change, so it does not rebut the presumption.

Finally, we disagree with the judge that the General Counsel's proposed formula is not reasonably calculated to establish the amount of losses suffered by reason of the unfair labor practice at issue. As discussed in section B above, there are variables that make it impossible to determine with certainty who would have worked particular days of overtime had the Respondent not changed its selection procedures, but in such cases, uncertainties are construed against the

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ness—the Board's compliance officer—devised and about which he testified. Thus, our disagreement with the judge set out above does not amount to overturning a credibility resolution as that term is generally understood.

[10] The General Counsel's actions in this regard comport with Sec. 10630.1 of the Board's Compliance Casehandling Manual which states that the compliance officer should describe how the computation of backpay should be adjusted when entitlement of backpay is affected by evidence introduced at hearing.

wrongdoer, and all that is required of the General Counsel is a nonarbitrary formula designed to produce a reasonable approximation of what is owed. See, e.g., *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), enfd. mem. 48 F.3d 3232 (10th Cir. 1995); *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, 36 (1991), enfd. mem. 952 F.2d 1393 (3d Cir. 1991).

First, we find that the General Counsel's formula took adequate account of the fact that employees were free to decline overtime opportunities. Because the voluntary nature of overtime remained a constant throughout both the representative period and the backpay period, the General Counsel's use of a 3-year representative time period for comparison purposes was likely to produce a fairly accurate picture of the amount of overtime, on average, that individual employees were willing to work. We reject the judge's apparent reliance on speculative testimony about whether employees might have refused overtime more often than in the past had the overtime been offered to them. Mitchell Eveleth, an employee appearing as a witness for the Respondent, testified that he ''probably'' would have accepted less callout overtime during the backpay period had it been offered him;[11] and Edwin Jenks, one of the Respondent's supervisors, speculated that employee Gerald Fedders (who did not appear at the hearing) would have worked less overtime because he was getting older, played golf and softball, and, in Jenks' opinion, did not need the money. Such vague and speculative testimony is insufficient to defeat the presumption that backpay is due because of the unlawful reduction in offered overtime.

We also find no merit in the Respondent's contention that the General Counsel's formula is flawed because, owing to such factors as technological changes, the total number of available overtime hours may have declined during the backpay period. By calculating each employee's overtime during the backpay period as a percentage of the total available during that period, variance in the actual number of hours is taken into account. We acknowledge that the General Counsel did not segregate callout overtime from other kinds of overtime in constructing his formula, but we find, contrary to the Respondent's contention, that this failure is insufficient to condemn the formula in light of the lack of any firm basis for the Respondent's contention that callout time was subject to relatively greater reductions during the backpay period than were other kinds of overtime. The Respondent's supervisor, Jenks, ''guessed'' that callout overtime had made up about 20 percent of total overtime during the representative period, and although he testified that it was ''something under'' that during the backpay period, he was unable to say how much. Further, the Respondent had represented to the General Counsel that examination of individual employee timecards covering a period of 5-1/2 years might reveal the categories of different overtime, but the Respondent kept no records compiling overtime by category. Because the Respondent was urging that callout and standby overtime did not constitute a substantial portion of the total worked, it was required to do more than gesture vaguely in the direction of thousands of employee timecards.

Accordingly, we find that the General Counsel has used a formula reasonably designed to ascertain the amount of standby and callout overtime backpay lost by certain unit employees as a result of the Respondent's unilateral change in the selection procedures.

[11] Eveleth conceded that he was probably owed at least a small percentage of what the General Counsel was claiming for him in the amended specification, and this was before the General Counsel reduced the amount claimed by virtue of excluding overtime hours for Kogan and Keefe during the representative period.

ORDER

The National Labor Relations Board orders that the Respondent, Intermountain Rural Electric Association, Sedalia, Colorado, its officers, agents, successors, and assigns, shall make whole the following claimants by paying each the amount opposite his name, plus interest:

Gerald Fedders	$2,123.04
Mitchell Eveleth	1,870.26

William J. Daly, Esq., for the General Counsel.
Martin Semple and *Patrick B. Mooney, Esqs. (Semple & Jackson)*, of Denver, Colorado, for the Respondent.
Joseph M. Goldhammer, Esq. (Brauer, Buescher, Valentine, Goldhammer & Kelman), of Denver, Colorado, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

I heard this matter on January 27, 1994,[1] in Denver, Colorado, pursuant to the November 29, 1991 Board decision in the underlying unfair labor practice case, in which the Board affirmed the findings and conclusions of the administrative law judge in that portion of the case, relevant to the instant matter (G.C. Exh. 1(a)) (304 NLRB 783). That is, the Board affirmed the finding of the administrative law judge that the Respondent acted unlawfully by unilaterally changing the established callout and standby lists for selecting employees for overtime, by substituting instead an alphabetical rotation system. On February 3, 1993,[2] the Court of Appeals for the 10 th Circuit affirmed the Board's judgment in an unpublished one-page order and judgment (G.C. Exh. 1(b)).

[1] Without objection, I convened the parties at 3 p.m. on January 26, 1994, for a prehearing discussion of procedures and certain collateral issues. (See Supplemental Tr., pp. 1–38.)

[2] Unless otherwise indicated, all dates herein refer to 1993.

On July 30, a compliance specification and notice of hearing was issued (G.C. Exh. 1(c)). In this document, the General Counsel alleged that Respondent owed certain moneys to employees to make them whole for deductions of medical and premium amounts ($83,391.52) and for Respondent's failure to include all compensated hours worked toward eligibility for overtime premium pay ($2,996.15), and for Respondent's unilateral change in the procedures for selecting employees for callout overtime work at the Sedalia, Colorado facility.

On January 14, 1994, an amended compliance specification and notice of hearing was issued (G.C. Exh. 1(g)). In this document, the General Counsel alleged only that Respondent owed certain moneys to four employees to make them whole for its unilateral change in the procedures for selecting employees for callout overtime work at the Sedalia facility:[3]

(1) Mitchell Eveleth	$3,017.17
(2) Gerald Fedders	4,589.42
(3) Gordon Novacek	1,583.73
(4) James Fox	1,035.52

On January 26, 1994, Respondent filed its answer to amended compliance specification, in which it denied owing any money to the four named employees (G.C. Exh. l(j)). Appended to Respondent's answer was a letter to Respondent's counsel from Darl Bien, Ph.D, Professor of Statistics at the University of Denver. This letter which supported Respondent's theory of no liability was eventually struck from Respondent's answer, but later admitted in Respondent's case (R. Exh. 11), when it called Dr. Bien as an expert witness in the area of statistics. To support Respondent's claim that Dr. Bien is an expert in the field of statistics, Respondent offered Dr. Bien's multipage resume into evidence (R. Exh. 10). There is no conflict as to Dr. Bien's expertise in this area and I find him to be an expert in the field of statistics.

After Dr. Bien concluded his testimony, General Counsel claimed surprise and asked for additional time in which to retain, consult with, and possibly call its own expert witness. Respondent denied that General Counsel had reasonable grounds to claim surprise, but over Respondent's objection, and after hearing all other evidence, I held the record open for 30 days to give General Counsel time to retain, consult with, and possibly to call his own expert witness. As matters turned out, on February 28, 1994, General Counsel wrote a letter to me which reads as follows:

> The General Counsel has determined that he will not offer rebuttal testimony in the above-captioned cases. Accordingly, I request that the record be closed, and that an appropriate date be set for the submission of briefs.
>
> /s/ William J. Daly

On March 2, 1994, I issued an order closing the record and setting an appropriate date for the submission of briefs.[4]

[3] Apparently, Respondent paid all or most moneys due and owing under the deleted specifications, an amount ''in the range of $100,000.00,'' according to Respondent's attorney (Tr. 219).

[4] General Counsel's letter is admitted into the record as ALJ Exh. 1 and my order is admitted as ALJ Exh. 2.

I. FACTS

The instant case deals with callout overtime which is one of several categories of overtime utilized by management at the Sedalia facility. By ''callout'' overtime is meant the calling out of employees during evenings, as well as on weekends and holidays, to perform emergency work which could not await normal business hours. The term covers a related type of overtime called ''standby'' which applies only to weekends and holidays where an employee stands by, or is available to be called out for overtime work during this period.[5]

As explained in greater detail by the administrative law judge in the underlying case, pages 794–795, article 12, section F of the 1987–1988 contract provided that ''overtime shall be distributed as equitably as possible.'' Since the contract was otherwise silent, on a callout procedure, an overtime committee was annually elected by bargaining unit employees. At the beginning of each calendar year, the committee would rank linemen in inverse order of overtime hours worked in the preceding year. Then for the current year, the employees would be called out for overtime in ascending order, starting with the employee who had worked the least number of past overtime hours.

When a given employee was reached for overtime, he was permitted to decline the assignment for any reason. Among the reasons utilized by certain employees was the duration and difficulty of the work, weather conditions or season of the year, conflicts with other jobs or businesses, the need for additional income, physical condition or age (generally), and perhaps a host of other reasons.

In presenting its case, the General Counsel relied upon Robert Cervone, a Board field examiner for 2 years, as the General Counsel's only witness. After attempting a number of different calculations which were eventually discarded, Cervone finally decided to establish a representative period of time immediately prior to Respondent's unilateral change in awarding overtime hours. This was the period of 1986, 1987, and 1988. Cervone then calculated the average amount of total bargaining unit overtime worked by each of the 22 employees during the representative period. Cervone calculated the average amount of overtime by first adding up the total amount of overtime worked by all bargaining unit employees during 1986, 1987, and 1988 and then computing the individual overtime hours of each bargaining unit employee into a percentage of the whole for each of 3 years (G.C. Exh. 2). The three figures were then themselves added, and divided by three to arrive at the particular employee's representative percentage.

Cervone then repeated the above procedure for the backpay period of 1989, 1990, 1991, and 1992 as divided up into appropriate quarters of these years. After comparing the individual averages for the backpay period to the representative period, Cervone concluded that only 4 out of the 22 bargain-

[5] Other types of overtime not involved in this case include (1)''continuing'' overtime which applies to work in progress at the end of a workday which must be finished before workers leave, (2)''scheduled overtime'' when construction is at a peak and management knows in advance when more people will be required, (3)''specialty'' overtime for employees with special skills for extra work only they can perform.

ing unit employees were entitled to backpay as indicated above.

During the hearing, Cervone was vigorously cross-examined by Respondent's attorney as to his background, his prior experience as a Board agent, and most importantly, as to his methodology. As a result, the General Counsel submitted the following at page 4, footnote 2 of his brief:

> At the hearing, Respondent introduced evidence showing that several of the employees whose hours were used to arrive at the total overtime hours worked by the bargaining unit were, in fact, not in the bargaining unit during the representative period, or were in the unit for only a part of this period. As the General Counsel's formula contemplates calculation of the representative percentage based on the total *bargaining unit* overtime worked during the representative period years, recalculation of the representative percentage is warranted. [See attachment A.] [Emphasis in original.]

At page 5, footnote 3 of his brief, the General Counsel also recognizes that certain employees included in Cervone's calculations for the backpay period had not been in the bargaining unit throughout all the backpay period. As a consequence the General Counsel asserts, recalculation of the quarterly overtime totals is also warranted (attachment B). Finally at page 5, footnote 4, the General Counsel contends that in light of his recalculations described above, it is also necessary to recompute the employees' quarterly backpay alleged to be due and owing, in order to arrive at an accurate total background figure (attachment C).

Thus purporting to recalculate using Respondent's own figures (R. Exh. 15), the General Counsel now alleges in his brief as follows:

	Old Figure	*New Figure*
Eveleth	3,017.17	1,870.26
Fedders	4,589.42	2,123.04
Novacek	1,583.73	301.51
Fox	1,035.52	179.72

Of the four employees listed above, only Eveleth testified. Called as Respondent's witness, Eveleth disavowed any backpay, claiming that even if Respondent had never changed its callout system for overtime, he knew that he would have turned down sufficient overtime, as he did during the representative period, that he would not be entitled to backpay. On cross-examination, Eveleth allowed that perhaps he might be owed 10-percent of what the General Counsel was then claiming he was owed (Tr. 130). (Whether the 10 percent figure still applies in light of the General Counsel's recalculation is unknown).[6]

[6] I agree with the General Counsel's contention, expressed at p. 13, fn. 7, of his brief, that because the Board's remedies are in furtherance of public, not private rights, Eveleth's choice is not controlling and even if untainted, is not relevant. *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648 fn. 5 (1985). Accordingly, in reaching my decision in this case, I have assigned no weight to Eveleth's testimony.

II. ANALYSIS AND CONCLUSIONS

A.

I begin with some basic legal principles. For example, it is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966); *Arlington Hotel Co.*, 287 NLRB 851 (1987), enfd. on point 876 F.2d 678 (8th Cir. 1989). In a backpay case, the sole burden on the General Counsel is to show the gross amounts of backpay due—''i.e., the amounts the employees would have received but for the employer's illegal conduct.'' *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 544 (1943).

In the instant case, the General Counsel issued an amended backpay specification after the employer apparently paid all health benefit premiums and remedied its failure to include all compensated hours worked toward eligibility for overtime premium pay (Tr. pp. 10–11). As noted above, in an unchallenged assertion made at hearing, Respondent's counsel stated that it had paid an amount in the range of $100,000 before the hearing had even began. This payment required the General Counsel to issue an amended backpay specification focusing solely on the change in the procedures for selecting employees for callout overtime work (G.C. Exh. l(h)). In this proceeding, Respondent challenges the formula used to compute overtime allegedly due and owing to the discriminatees.

It is well established that the Board is not required to attain mathematical precision in its formula for determining gross backpay. ''Any formula which approximates what discriminatees could have earned if they had not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances.''*Am-Del-Co., Inc.*, 234 NLRB 1040 (1978), *Boyer Ford Trucks*, 270 NLRB 1133 (1984). All that is required is that the formula be reasonably designed to arrive at as close an approximation of the amount of backpay due as possible. *Rikal West, Inc.*, 274 NLRB 1136 (1985); *Master Slack*, 269 NLRB 106 (1984), enfd. 773 F.2d 77 (6th Cir. 1985). See also *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 452 (8th Cir. 1963); *Mastell Trailer Corp.*, 273 NLRB 1190 (1984).

One of the common formulas used by the Board is called the projection of average earnings formula which estimates gross backpay by projecting over the backpay period the earnings or hours worked by the discriminatee during a representative period prior to the discharge.[7] This method has been approved by the Board *DeLorean Cadillac*, 231 NLRB 329 (1977), and by the courts. *NLRB v. Pilot Freight Carriers*, 604 F.2d 375, 379 (5th Cir. 1979); *NLRB v. Charley Topprino & Sons*, 358 F.2d 94, 97 (5th Cir. 1966); *NLRB v. Rice Lake Creamery Co.*, 365 F.2d 888, 891 (D.C. Cir. 1966).

In evaluating the formula chosen by the General Counsel, I am reminded by the Board that any ambiguities, doubts, or uncertainties are resolved against Respondent, the wrongdoer, because an offending respondent is not allowed to profit from any uncertainty caused by its discrimination. *Florida*

[7] Although no discharges are in issue in the instant case, I assume without finding that the average earnings formula method may be adapted to computing overtime.

Tile Co., 310 NLRB 609 (1993); *Ryder Systems*, 302 NLRB 608 fn. 4 (1991), enfd. 983 F.2d 705 (6th Cir. 1993); *Big Three Industries Gas*, 263 NLRB 1189, 1190 fn. 8 (1982).

B.

Notwithstanding the above principles of law which command me to give great deference to the formula chosen by the General Counsel, I conclude that this case must be dismissed. First, although Respondent has not moved to strike the General Counsel's attachments A, B, and C appended to his brief, I do so on my own motion. These attachments were never made part of the formal record and to my knowledge, Respondent was never given notice of the General Counsel's intent to, in effect, submit a second amended compliance specification. See *Ideal Dyeing & Finishing Co.*, 300 NLRB 303 fn. 1 (1990); *Mademoiselle Knitwear*, 297 NLRB 272 fn. 1 (1989); *Coppsinger Machinery Service*, 279 NLRB 609 fn. 1 (1986).

I also note that the General Counsel never moved to reopen the record to admit attachments A, B, and C. On the contrary, in his letter to me of February 28, 1994 (ALJ Exh. 1), which I have recited above, the General Counsel specifically requested in pertinent part, ''that the record be closed.''

Besides the General Counsel purporting to submit evidence after the record has been closed, the procedure is also improper as there is no indication in the General Counsel's brief, as to who recalculated the new backpay amounts. Whether Cervone now has another bite at the apple, without having to undergo the unpleasantries of cross-examination, or whether a substitute Board agent was brought in, or whether trial counsel himself performed the new calculations—who knows. This procedure is simply not proper. I find that Cervone should have made the proper investigation and calculations prior to hearing. The General Counsel's unsuccessful strategy in footnotes 2, 3, and 4 of his brief has impliedly discredited his sole witness, Cervone, a position in which I readily join.

As additional rationale for recommending dismissal of this case, I also find, in agreement with Respondent, that the usual presumption that some money is owed by virtue of the unfair labor practice finding does not apply in this case. To support this conclusion, Respondent argues (Br. pp. 7–8) that the presumption has been applied only in discriminatory discharge cases. Without ruling on this contention, I find instead that Respondent apparently paid moneys resulting in the amended specification as described above. Thus without a presumption on which to rely, and with its sole witness discredited, I find that the General Counsel has failed even to establish a prima facie case. For this reason, it is unnecessary to consider the testimony of Respondent's expert witness, Dr. Bien.

In conclusion, I also find that the formula chosen by the General Counsel in this case simply is not a formula reasonably designed to produce approximate awards due. See *Trinity Valley Iron & Steel Co. v. NLRB*, 410 F.2d 1161, 1177 fn. 28 (5th Cir. 1969). In support of this conclusion, I made the following findings,

(1) Since call-out overtime was 100% voluntary,[8] the evidence reasonably shows that unit employees would be less likely to accept assignments in the backpay period due to the aging factor and due to changes in personal circumstances such as Novacek carpooling and running a business with his daughter in 1989–1992 as described by Edwin Jenk, Respondent's witness and company supervisor.

(2) There was less overtime to be had during the backpay period. Again, Jenk described changes in technology resulting in less overtime opportunity during the backpay period. For example, outages due to lightening strikes has been markedly reduced (Tr. p. 170).[9]

(3) By basing calculations on total overtime in both the representative and backpay periods, when only callout overtime is in issue, the final computation may or may not be a proper figure.

At page 7 of his brief, the General Counsel anticipates this last finding, noting ''that the total overtime figures used in the General Counsel's formula include other types of overtime, e.g. continuation overtime, special crew overtime and scheduled overtime.'' The General Counsel goes on to state, ''in spite of this, the formula still produces a reasonable approximation of the backpay amounts in the circumstances present here.'' The General Counsel bases that conclusion on the fact that, ''there is no evidence to show specifically what percentage of total overtime is made up of callout and standby. The overtime records supplied by Respondent provide only total overtime figures. As a result, specific callout and standby hours are unavailable.''[10] Assuming for the sake of argument only, that Cervone could not have based his calculations on callout and standby overtime hours rather than total overtime hours, I fail to see how it then follows that the General Counsel can merely choose the universe of total overtime without assuming the burden of proof to show that the end result would be approximately equivalent to calculations based solely on callout and standby overtime hours. No such showing has been made in this case and I am in no position to speculate on the end result.

For all the reasons discussed above, I respectfully recommend that because the General Counsel has failed to prove that Respondent owes any money to any person alleged in this case to be a discriminatee, the case should be dismissed.

[8] In this regard, I grant the General Counsel's motion at p. 11, fn. 6 of the brief to correct the transcript by changing Cervone's response regarding whether the callout overtime system during the representative period was mandatory or voluntary, to ''voluntary which is what I believe he testified to, and which all the evidence shows was the case.''

[9] Due to heavy construction schedules, certain other areas of overtime have been increasing, but not callout overtime which has been and is decreasing (Tr. 171).

[10] The General Counsel notes at p. 7, fn. 5, of his brief that Cervone could have determined specific callout hours by examining all unit employees' daily timecards over a 5-1/2-year period (Tr. 106–107). This information was given to Cervone by a company secretary. Cervone did not otherwise investigate the possibility of culling out specific callout overtime hours.